

**Comparison of constitution of complicity in Unity and Departure System - With
Perspective of indirect Principal
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**Сравнение строения соучастия в единстве и системе отправления - с точки зрения
непрямого Принципала
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Abstract: *previous Chinese criminal theoretical System was a unity of wrongfulness and culpability. In recent years the system based on departure of wrongfulness and culpability has been introduced. It can be distinguished from the former by definition of wrongfulness. On the issue of Indirect principal accomplice, the unity system cannot provide a reasonable answer, while the departure system can explain it with limited accessory theory, which provides new perspective for analyzing Indirect principal accomplice.*

Аннотация: *ранее китайская криминальная теоретическая система представляла собой единство противоправности и виновности. В последние годы была введена система, основанная на незаконности и виновности. Это и есть главное отличие такой системы - незаконность. Что касается косвенного соучастника, система единства не может дать разумный ответ, в то время как система отправления может объяснить это с ограниченным количеством аксессуаров теории, которая обеспечивает новые перспективы для анализа косвенного соучастника.*

Keywords: *unity system, departure system, indirect principal, extreme accessory theory, limited accessory theory.*

Ключевые слова: *система единства, система выезда, косвенные основные, ограниченная теория принадлежности.*

Introduction

China's traditional criminal theoretical system can be named after unity system, known as flat and coupling system with four elements, which are subject, object, subjective and objective elements of a crime. In recent years much attention have been drawn to departure system, introduced from civil law countries. It also be considered as a stereo system according to the arrangement of elements constituting crime. To sum up the differences between the two system, we could find the following three: Firstly, the conditions for the establishment of crime combine independently or dependently; Secondly, the conditions for the establishment are on the same level or in stereoscopic structure; Thirdly the order of the elements is essential or not [1]. Compared to the other, the unity system considers the wrongfulness and culpability simultaneously through mixture of four elements, while it does not use the concept of the wrongfulness and culpability. It is unity of wrongfulness and culpability. Corresponding to the former, the departure system distinguishes the wrongful factors from the culpable ones. The distinctiveness will cause different analysis in the field of complicity, including the issue of indirect principal. It's critical to figure it out what effect the differences bring about, and whether effect is simply distinctiveness of thinking, or reflects the up or down side of methodology in practice?

1. The overall differences between the unity system and the departure system

1.1. Unity system: culpability is the premise of wrongfulness

The division between Wrongfulness and culpability, which is the most remarkable feature of German doctrine, is not a convention lasting for centuries. Hegel divided the concept of unlawful into non-criminal men's rea, fraud and crime. Crime is to be negative, not for causing damage, but exists against the law as its nature. Law is absolute and therefore is unlikely to be negative, while the crime is not something original and positive so that penalty is responded to it as negation. That is to say, crime is negative and penalty is negation of such negation [2].

Sinn thus argued that, to constitute violation of law in the form of crime, the personal condition as individual is necessary. Only those with capacity to recognize the command or prohibition on criminal law norms, to distinguish whether it is legal or illegal, and to challenge the law can undermine the law and make communication on the issue of effectiveness of law [3].

This statement implies that, the illegal term is relevant to penalty, while non-illegal is relevant to no penalty. Criminal liability is not a connection between the evaluation as illegal and penalty, but the concept of mixture of them. On this premise the possibility of compliance with the norms should be given priority in criminal law methodology.

The advocates of traditional system with four elements put forward that, constitution of the crime determine the social harm and its degree, and consist of all the objective and subjective requirement, which represent the four elements above, according to criminal law. To interpret the relationship between the various requirements, a scholar argues that, constitution of crime is the sum of a series of objective and subjective elements which interdepend with each other. Any elements cannot be put that name if separated from the entirety of constitutions of crime. Likewise, absence of any one of elements would cause that other elements lose its significance as constitution of crime thus the overall constitution of crime would not exist [4].

Such view of a loss for all sides, shares the same standpoint with Sinn's that sequence of examination of lawlessness and liability is unnecessary. Although there are a number of differences in micro perspective, the concept of criminal illegal behavior does not consist of the so-called lawlessness without responsibility. In other words, the unity system operates without sequence of lawlessness and liability. When analyzing the case in which subject lack of capacity for criminal responsibility under unity system, the examination of liability would impact on scrutiny of actus reus.

1.2. Departure system: wrongfulness prior to culpability

In Germany and Japan, the mainstream idea is separation between wrongfulness and culpability. The most classic description is that the substance of crime is wrongfulness and culpability. In the context of criminal law, there are both wrongfulness with culpability as a prerequisite to it, but also wrongfulness without it. From this statement we can see that the criminal culpability and illegality do not exist on the same level and both have their independent meaning in the system. Therefore, we can observe a three pillar structure of non-lawfulness, wrongfulness with culpability as a prerequisite to it and wrongfulness without culpability, as a more complex pattern than counterpart under unity system. This means recognizing the existence of two concepts of crime in the criminal law. Namely, criminal behavior without guilt, and wrongful and culpable behavior.

2. The indirect principal: the suspected common crux of the two theoretical criminal system

2.1. The concept of indirect principal in unity system: should be cancelled?

According to China's common theory of unity system, the foundations of establishment of the joint crime include the two aspects, namely the actus reus consistent with the all constitutive requirement, and mens rea unified under the same charges. Then, the establishment of instigator, according to the extreme accessory theory, is that the abettor's actus reus and mens rea are consistent with abettor's incitement. When the abettor's mens rea is not consistent with the instigator's, or his capacity for criminal responsibility is limited, the instigator might be

sentenced in the name of indirect principal in order to fill the law gap. Therefore, although the elder scholars did not put that name to it, some scholars believe that in fact the analysis above of China's traditional theoretical system belong to the extreme accessory theory.

According to the principle of unity system, logically the four elements interdependent with each other. Only in overall perspective can affirmation and negation of each element be judged correctly. It is meaningless to judge them respectively. Take actus reus for example. When a subjective intent is denied, the significance of the objective behavior should also be denied. In this case, a wrongful objective behavior without subjective intent did not exist in the unity system. If an instigator abets a twelve-year-old teenager consequently the child independently steals a purse within valuable property, it cannot be affirmed criminal wrongful that "a twelve-year-old children conceiving illegal possession purpose taking away others valuables while others do not pay attention ". Based on unity theory, the behaviour between the "instigators" and the "instigated" does not constitute complicity, then we can only judge each individual's acts independently. There is a circular reasoning here: at the beginning judge whether the individuals' behaviors are consistent with four requirement of constitution of a crime, if the answer is yes then draw a conclusion that the relationship among every participant is criminal joint commitment and vice versa. Then use the issue whether joint crime relationship is affirmed or not to evaluate the nature of the behavior of participants' behavior in reverse. Once complicity is negated each behavior using others, can no longer be evaluated as their own behavior. The concept of indirect principal emphasizes the behavior of using others and dominance of others, which is apparently contrary to the unity system doctrine. As a result, in virtue of concept of indirect principal from departure system, unity system seems to ease the crisis of its accomplice theory, but as a matter of fact the method undermines its own theoretical logic foundation. But if not introduce the concept of indirect principal, unity system would encounter fundamental challenges on the field of joint crime.

This mode of thought has considerable problems when dealing with joint crime. take this case for instance: a thirteen-year-old A and sixteen-year-old B with intention of murder assault a man named C, and A Beats C to death in the end. Since A lack of capacity of action due to his age, his behavior can not constitute a crime and be evaluated as wrongfulness automatically. B's behavior independently constitutes an attempt murder [5]. Depending on whether accomplice relationship is established or not, criminal liability is not based on the reasonable foundation. What's worse, the unity system makes the basis of this relationship far more chaotic, and brings about a troublesome reasoning for next inference stage. Even if we admit that construction of theoretical complicity system relies more on positive law provisions rather than the theoretical crime constitution system itself, it cannot be ignored that unity system itself should be responsible for some confusion in the field of accomplice.

2.2 Indirect principal in departure system: should be introduced?

Coincidentally, indirect principal itself is not a concept first appeared in the departure system in early age. Early German criminal law legislation adopted form of accomplice in direction if extreme accessory theory. In 1943, the criminal code set establishment of instigator in the provisions of Article 48, Paragraph 1 that, only those who abets others to implement crime with criminal liability can be attributed to instigator. But there was non-punished blank when dealing with the case that someone instigates the other who lacks of criminal capacity. According to the mode, the one who instigates is sentenced as abettor when behavior of the one who accepts incitement is defined as wrongful and culpable, then there will be a contradiction. In order to impose punishment on the one who used others without qualification for being instigator, the concept of indirect principal was created as a substitute for instigator in complicity system. We can name it as substitute role theory. This implied that indirect principal was separated from instigator with the purpose of fill the gap of penalty originated from the provision above. This concept, will be used as a tool to criminalize those who use someone having normative obstacles as their tool for implementing crime. We can call it normative obstacles theory.

Advocates for departure system realize that insisting on the doctrine of extreme accessory theory to analyze the requirement of constitution of joint crime will lead to misunderstanding of role and function of indirect principal. This is a common problem in China's traditional theoretical criminal theory within four elements when dealing with indirect principal. In the departure system, substitute role theory, on the basis of extreme accessory theory, is explaining the relationship between indirect principal and other crime participants. Meanwhile the normative obstacle theory reveals the connotation of indirect principal's criminal culpability in reverse.

First of all, the substitute role theory is unreasonable. Some scholars argue that the extreme accessory theory actually determine the substitute role for indirect principal. This thought based on extreme accessory theory does not comply with the doctrine of concept of the limited principal, which demands judgement of principal prior to that of accessory. Besides it does not conform to presumption of innocence or lighter crime, because normally instigator is a kind of accessory, and indirect principal is still a kind of principal which is more severe than the former. The substitute role theory actually estimates the establishment of the lighter instigator at first, and directly attributes those kinds not belonging to instigator to more severe range of indirect principal [6].

Secondly, the normative obstacle theory understands the scope of normative obstacle incorrectly. The ambiguous understanding does not comply with the principle of suiting punishment. Correspondingly extreme accessory theory leads to a serious consequence that range of indirect principal extends unreasonably. Due to the extreme accessory theory's limiting instigation as instigating others to implement crime with culpability, can we see the hypertrophy phenomenon indirect principal.

Some scholars explain this by giving an example: People under 14 years of age are less awareness of the norms than adults, but for murder, arson, robbery, rape, theft and other felonies, it is reasonable to demand them to understand the degree of these crime. Therefore, when these teenagers are incited by others to commit crime, to evaluate them as others' tools like material is not always correct. Especially when the teenager commit a crime based entirely on independent means and others merely offering assistance, the man offering assistance just plays a minor role. In the above situation, considering the helper as indirect principal ignores his lighter impact which offer a foundation for him to be punished lighter. Consequently, extension of indirect principal is clearly contrary to the principle of suiting punishment to crime [7].

3. The outlet for indirect principal: seeking in departure system

3.1. The legal basis for departure system: pluralistic concept of crime

In accordance with the foregoing, if we stick to the extreme accessory theory, said the idea, it is extremely difficult to explain the concept and scope of indirect principal reasonably. We cannot find an appropriate way based on the single concept of crime originated from unity system so we should give up the unity system. Is there any way can be found in the departure system to tackle with indirect principal issues?

The answer is yes. In fact, the concept of crime in Chinese criminal law is in fact diversified. For example, Chinese criminal law mention wrongful acts with non-criminal responsibility and limited criminal responsibility. [8]. That showed an affirmation of behavior without culpability is equally possible to involve in wrongfulness. Otherwise we cannot explain why these behaviors have significance on criminal law, and why these actors should be controlled according to criminal law. If the analysis complies with the theory of unity system, the kind of behavior is not considered wrongful in criminal law, the provisions of criminal law above needn't have arranged legal consequence for these people. Therefore, in the perspective of interpretation, the unity system is only aware of thirteenth provision of the criminal law, and just saw wood for the trees. The proposition that crime is equal to wrongfulness and culpability is premise of wrongfulness does not comply with the multiple definitions of lawlessness in our criminal law. Its denial of wrongfulness without culpability exposes many flaws in respective of interpretation, which indirect principal is a typical one of them. On the contrary, the theory of departure system not

only recognized the wrongfulness with culpability but also wrongfulness without culpability. As a result, it conceives more rationality while explaining indirect principal in respective of positive law than unity system.

3.2 New method of departure system: limited accessory theory

In accordance with the present common theory, since criminal wrongdoing participants are responsible for their own wrongful implementation instead of others' individual responsibility. Therefore, we should introduce the concept of complicity in the sense of wrongfulness and give up the concept of complicity in the sense of culpability. In other words, joint crime is a form of wrongfulness, rather than the form of culpability. This is typical standpoint of limited accessory theory.

The current proposition has been gradually popular domestically that wrongfulness should be restricted to objective aspects well as culpability should be restricted to subjective aspects. In fact, this statement reflects the principle of neo-classical doctrine that subjective and objective aspects should be entirely separated into different layer, and *meas rea* should be regarded as a mere factor of culpability. This premise remains the advantage of distinction of thinking layers as a result the limited accessory theory can take place of extreme accessory theory. The advocates of limited accessory system in neoclassical theoretical criminal system argue that, the man whose behavior is wrongful in the objective sense can be evaluated as principle, while the one who incites him to act so can be evaluated as instigator. In the situation, the principal's subjective intention is not the requirement for the user of his behavior constituting the abettor [9]. In consequence, the scope of indirect principal shrinks reasonably.

In another kind of typical case that an adult abets a twelve-year-old teenager to poison to kill a certain person, if we adopt that method of extreme accessory theory, it will cause imbalance in evaluation of conviction and punishment. But according to the viewpoint of limited accessory theory, since the principal can judge right and wrong in the sense of criminal law, he can no longer be evaluated as tool of the instigator. In this case the teenager and adult can be considered instigators and instigated to the extent of wrongful joint crime. The instigated minor is perpetrator however will not face penalty for not reaching age for criminal responsibility. As for the adult, he should be identified as instigator for intentional homicide, and should be sentenced based on his effect according to the twenty-ninth article in Chinese criminal law [10].

In another typical case that there is a participant without criminal responsibility, and the other limited criminal liability or their behavior are involved in aggravation of the crimes, limited accessory theory can provide a reasonable analysis. Take a real case for example, an adult together with a minor implemented gang rape. The court sentenced adults identified as gang-raped and the minor bot guilty. The reason is that gang rape is joint behavior in objective sense. As long as there are the participants' common understanding of gang rape, and implementation of gang rape based on common understanding, regardless of whether the complicity is established (author note: the term complicity here refers to the concept of joint crime in the sense of extreme accessory theory, in which culpability of every participant is required). Although the argument here used some of the jargon of unity theory, but substantially adopted the limited accessory theory in departure system. On the contrary, if the judge followed the logic of the unity theory, the behavior of minors is not wrongful, then it could not be imagined the possibility that the court affirmed their gang rape while judging the behavior of the adult separately. That would lead to a penalty gap.

Conforming to distinctive classification of subjective culpability and objective wrongfulness in neoclassical system, the advocates of objective limited accessory theory, deem due to deliberation and negligence are irrelevant to the judgment of joint crime, it is not only affirmation of deliberation joint crime is self-evident, but also negligent joint crime are tenable [11]. In contrast, affected by teleological theory, in neoclassical-teleological system, *meas rea* is no longer element of culpability, but becomes one of the wrongful elements. On the wrongful layer, there are both the traditional objective element and subjective element from that on. Thus, the judgement on

complicity relationship in limited theory is not purely judgment on the objective elements, but in combination with subjective elements. The combination of subjective and objective judgments on joint crime relationship, are not groundless in the Chinese criminal code. The twenty-fifth article in criminal law clearly demands subjective intent in joint crime and excludes the type of joint criminal of negligence [12]. Therefore the limited accessory theory considering subjective wrongfulness is on this foundation.

On the contrary, if we stick to defining limited accessory theory in the sense of objective wrongfulness according to neoclassical system, we would found that the scope of indirect principal shrinks excessively. Because if the limited accessory theory in the sense of objective wrongfulness is carried through, the objective wrongful elements would function as only referential standard of judgment of complicity relationship. For instance, A takes advantage of B to commit crime and B is not conscious of his wrongdoing. Without considering the subjective intent of A and B, we would draw to a conclusion that B dominates the implementation objectively so he is perpetrator, and A should be attributed to accessory. By contrast, considering the viewpoint of limited accessory theory concerning both subjective and objective aspects, A dominates over B in the sense of subjective aspects, thus there is no doubt that he is indirect principal. This conclusion is obviously more reasonable.

In fact, limited accessory theory in the sense of objective wrongfulness cannot tackle with the problem of complicity relationship ultimately. As a matter of fact, that theory has to distinguish perpetrator and accessory by means of subjective aspects. However the issue of complicity relationship is pushed to the layer of culpability, which does not comply with its own doctrine that complicity is irrelevant to culpability. The internal contradiction cannot be covered any longer.

Some scholars point it out correctly: Actually some scholar admit the essential role of subjective aspects playing in distinguish perpetrator from accessory, "The instigated's committing deliberation 'is not the subjective requirement for instigator. It makes sense only in the situation that we need to distinguish indirect principal from instigator" [13]. However, the study of complicity relationship purposes to define the boundary between perpetrator and accessory. If we cannot make the classification in the layer of wrongfulness according to limited accessory theory in the sense of objective wrongfulness, we have to resort to reviewing the subjective aspects in culpability layer, which the method does not conform to its intrinsic principle. So there is no doubt that there is a barrier the advocates unable to overcome. combined with guilt belong to class of subjective intent to complete. Obviously joint crime is not only the issue of layer of wrongfulness but also spread onto the layer of culpability according to the logic of that theory [14].

Therefore, considering the essential role of subjective aspects playing in constitution of joint crime, limited accessory theory containing subjective and objective wrongfulness in neoclassical-teleological system is worthier of adopting.

Conclusion

The unity system adopts extreme accessory theory in order to judge complicity relationship, consequently leading to the excessive extending of the scope of indirect principal. In fact, indirect principal is not compatible to unity theory. On one hand, not introducing the concept of indirect principal is difficult to tackle with the penalty gap generated by traditional system, on the other hand, resort to that concept leads and cannot deal with the hypertrophy of indirect principal based on intrinsic logic of unity system. In stark contrast to unity system, thanks to its own characters of structure, departure theory generates limited accessory theory in the face of difficulties generated by extreme accessory theory, and with the purpose of settling new problem of indirect principal, limited accessory theory in the sense of objective wrongfulness evolves into the one concerning both subjective and objective wrongfulness along with the process of neoclassical-teleological system taking place of neoclassical system. In respective of entirety, limited accessory theory can only be rooted in a foundation that wrongfulness and

culpability should be divided into different layers and wrongfulness should be analyzed prior to culpability. That is, it is inevitable that we should think in a rational way of layers while concerning the issue of complicity. In the meantime, thinking mode of unity system should be given up.

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